DEPARTMENTAL GRANT APPEALS BOARD

Department of Health and Human Services

SUBJECT: Washington Department of Social and Health Services
Docket Nos. 79-103-WA-HC
79-151-WA-HC
Decision No. 176

DATE: May 26, 1981

DECISION

These two appeals by the Department of Social and Health Services of the State of Washington (State, Grantee) are from disallowances of Federal financial participation (FFP) by the Medicaid Bureau of the Health Care Financing Administration (HCFA, Agency) in expenditures claimed under Title XIX of the Social Security Act (Medicaid) for two Intermediate Care Facilities for the Mentally Retarded (ICF/MR) during the periods when the Agency claims no valid provider agreements existed for the facilities. Docket No. 79-103-WA-HC is an appeal from a disallowance in the amount of $2,627,724, representing $2,566,473 FFP claimed for the Rainier School for the period July 1, 1977, through April 26, 1978, and $61,251 FFP claimed for the Lakeland School for the period July 1, 1977, through November 17, 1977. Docket No. 79-151-WA-HC is a disallowance of a subsequent claim by the State of FFP for the same two facilities and for the same time periods, in the amount of $37,379. This represented $35,135 for Rainier School for the period July 1, 1977, through April 26, 1978, and $2,244 for the Lakeland School for the period July 1, 1977 through November 17, 1977. The facts and issues, other than the amounts, are identical in both disallowances, and the appeals have been considered jointly by the Board.

The record on which this decision is based includes: the State's Applications for Review; the Agency's brief in response, including responses to specific questions raised by the Board; the State's response to the Board's Order to Show Cause; two telephone conferences, summaries of which were furnished the parties; and affidavits and documents submitted by both parties. The Agency was not required to reply to the Order to Show Cause and did not do so. Based upon this entire record, we uphold the disallowances for reasons hereafter stated, except as modified for one day for Lakeland School.

General Background

In order for a state to obtain FFP for payments for Medicaid patients in an ICF, the first requirement is a valid provider agreement. This is entered into between the "single state agency" (designated under the Medicaid program with authority to administer or supervise the administration of the state Medicaid plan) and the facility, which may be privately or, as here, state owned. Before a valid provider agreement can be entered into, the state survey agency (so designated under the Medicaid program and ordinarily the state authority which licenses health

facilities) must survey and "certify" the facility. The facility does not have to be in 100% compliance with all federal requirements in order to be certified. It may have defects which are found in the survey, which are not life threatening, provided there is a "plan of correction" which is accepted by the state survey agency.

This "plan of correction" not only lists the existing deficiencies, but sets up a plan for correcting them within a definite time schedule. If the plan of correction is acceptable, the state survey agency then ordinarily certifies the facility on a "Certification and Transmittal" form (Form 1539), commonly known as a "C & T." The last item to be completed by the state survey agency is Line 18, "State Survey Agency Approval," with space for a signature, and the title of the person so signing. Line 19 has space for the date of the state survey agency approval immediately to the right of the signature on Line 18. There is a separate line (11) for the "Period of Certification." See Tab A, Agency Brief. The single state agency enters into the provider agreement with the facility based upon the certification. The provider agreement may have its effective date backdated, but no earlier than the "date of certification."

Statement of Facts

In Washington the Health Services Division has the responsibility of certifying ICF/MR facilities under applicable Federal regulations for Medicaid. The State's survey of the Rainier School was completed on June 14, 1977, but the final plan of correction was not accepted until April 26, 1978. The C & T form was executed the next day, namely, April 27, 1978. The provider agreement with the facility was signed on July 28, 1978, but purported to be effective July 18, 1977.

The survey by the State surveyor for Lakeland School was completed on May 17, 1977. In its Order to Show Cause the Board stated that the date of the acceptance of the plan of correction was November 17, 1977, with the C & T form being executed the following day. The Board's statement was based on the chronology set out in the disallowance letters. A recent disallowance letter 1/ dated February 25, 1981 (Exhibit 1 to State's Response), gives the date of acceptance of the plan of correction for Lakeland School as September 16, 1977. The Agency has not

1/ This disallowance is the subject of a separate appeal to the Board, docketed as 81-44-WA-HC. In the telephone conference of April 14, 1981 the State specifically stated it did not want this appeal considered jointly with the two appeals here. It may be noted that this later appeal has factual differences, since it also involves two additional facilities.

disputed the September date. It is undisputed that the C & T form for Lakeland School was not executed until November 18, 1977. The disallowance letters in these two appeals state that the provider agreement for Lakeland was signed on December 13, 1977, purporting to be effective July 18, 1977.

The disallowances for both facilities were based upon the same grounds, namely, that FFP is not available for an ICF until a valid provider agreement exists. The Agency's position is that the applicable regulation was clear that the single state agency may not execute a valid provider agreement with an ICF until the State survey agency has certified the facility by actually signing the C & T form. The Agency therefore disallowed claims for FFP for the facilities for periods before the execution of the C & T forms.

Pertinent Regulations

42 CFR 442.12 provides as follows:

> (a) A medicaid agency may not execute a provider agreement with a facility for SNF or ICF services nor make medicaid payments to a facility for those services unless ... the State survey agency has certified the facility under this part to provide those services...
>
> (b) The effective date of an agreement may not be earlier than the date of certification.

An earlier regulation, 42 CFR 449.33(a)(6) (1977), was in effect for part of the period of the disallowances but the language was substantially the same.

Discussion

1. Date of Certification

The Grantee does not dispute the fact that the C & T forms for the two facilities were in fact signed after the date the provider agreements were stated to be effective. The Grantee does not question the regulatory provision under which the effective date of the provider agreement may not be earlier than the date of certification. It does question the policy of the Agency to limit certification to the date the C & T form was executed for each facility, respectively. 2/

2/ The State in its Application for Review argues that HEW (now HHS) lacked authority to limit certification of facilities to the date the C & T form "was executed and/or transmitted to DHEW" (p. 1). The

The Agency states in its brief that "[t]he real issue is whether or not there has been retroactive dating of the initial provider agreement prior to certification of facilities" (p. 2). Actually the real issue is whether the date of certification can be prior to the date of execution of the C & T form. The State says that "[w]ithout a definition of what certification meant, there was no way for the State to know that it was dependent upon when the C & T form was executed as opposed to any other date." (Response to Order to Show Cause, p. 3.)

The Board asked the Agency when the State should be considered to have notice that the date of execution of the C & T form was the effective date of certification. In response the Agency submitted two documents, a "Regional Director's Long Term Care Manual" and a "State Survey Agency Long Term Care Manual" (Tabs C and D, Agency Brief). The Agency offered evidence of distribution of these Manuals and the State did not deny having received them prior to the period of the disallowances.

The first manual offers no support for the Agency's position. It merely states that "the title XIX provider agreement may not be made effective earlier than the date of the survey agency's final determination and certification of the facility," citing 45 CFR 249.33(a)(6), the predecessor of 42 CFR 442.12. No one disputes this.

The second Manual is more relevant, for it addresses the C & T form itself. Paragraph 294 is headed "Certification and Transmittal (Form SSA-1539)," and states that the C & T form "is used by the State survey agency to certify its findings to the ... single State agency ... with respect to a facility's compliance with health and safety requirements."

The Board in a previous decision has considered the applicability of 42 CFR 442.12 to the requirement for certification of an ICF prior to the existence of a valid provider agreement for FFP purposes, and the use of the C & T form for certification. Maryland Department of Health and Mental Hygiene, Decision No. 107, July 2, 1980. The actual holding in Maryland is that the Agency was not arbitrary in interpreting 42 CFR 442.12(a) and (b) as meaning that a provider agreement can only be effective from the date of a facility's certification as meeting certain requirements, in view of the Medicaid program's aim to ensure quality care in sanitary and safe conditions (p. 4).

2/ Cont'
Agency has never contended that the C & T form had to be transmitted to HEW, as well as executed, before certification was effective. Similarly, Grantee argues that the State certification agency "fulfilled its certification on behalf of DHEW pursuant to approved state plans regarding its functions." (Id., p. 2.) No question has been raised by the Agency as to any violation of any state plan.

The decision also states that it is the Agency's interpretation that this certification "becomes effective on the date the survey agency indicates its approval by completing a HCFA Form 1539." It was not necessary for the Board to reach this decision in Maryland, which involved recertification of a facility, rather than the original certification here. The State was contending that when the survey agency signed the C & T forms it could backdate them to the date the prior provider agreements expired. There was no issue raised whether the date of certification had to be the date the C & T form was signed, or whether it could be some earlier date, if all the requirements for certification were then met and certification was manifested in some other manner.

The Board has also in a recent decision said that no particular form must be used by a state survey agency in certifying a facility for Medicaid participation. New Jersey Department of Human Services, Decision No. 137, December 1, 1980.

The Agency there contended, as it does here, that 45 CFR 250.100(c)(1) gives the Agency's Administrator the authority to designate the use of certain forms to determine Medicaid certification and that the State Survey Agency Manual instructed the State survey agency to use Form 1539 for certification. The decision stated that while the Form 1539 is the accepted and customary method of certification, its use was not mandated by regulation and "other forms or documents might be employed to certify a facility" (p. 5).

The State has not disputed the requirement for use of the Form 1539. It has claimed that there can be a certification at some point earlier than the date of signing of the form.

The Board is of the opinion that, as expressed in New Jersey, it is possible to have a facility certified without having the C & T form signed. In order to do so, a state survey agency "must communicate certain information in order that a facility be certified for Medicaid participation and that other requirements of the Medicaid regulations are met" (p. 5). If the Form 1539 is used, the Agency has not required that there be any actual communication to the single state agency, or to anyone else, to make certification effective. When the form is signed certification is complete, before anything else is done.

While the date of the signature on line 19 of the C & T is presumptively the best evidence of the date a certification determination was in fact made, the Board will accept that the certification determination was made on an earlier date, if established by other clear evidence. This evidence must show convincingly that all the requirements for certification are met, and the survey agency not only so determines, but commits its determination to writing in the form of notification to either the single state agency or the facility.

The application of this principle to the two facilities here yields a different result in each one, although the difference is very minor. The plan of correction for Rainier School was accepted on April 26, 1978, and all requirements were then met. The C & T was signed the next day. There is nothing in the record to show that there was any notification on April 26 of the acceptance of the plan of correction. Therefore the certification was not effective until the C & T form was signed on April 27, and the disallowance was correct.

The situation with Lakeland School is different. It appeared after the Responses to the Order to Show Cause that the plan of correction was accepted on September 16, 1977, but the C & T form was not executed until November 18, 1977. Following the reasoning above, the Board would consider permitting the provider agreement to be backdated to September 16, if, but only if, the facility met all requirements for certification as of that date, and the state survey agency communicated its determination that certification was in fact accomplished prior to the execution of the C & T by notifying the facility or the single state agency in writing.

Documentary evidence submitted by the Agency shows that certification was not properly completed until November 17, 1977. Attached to the affidavit of an auditor for the HCFA Medicaid Bureau are several memoranda from the state survey agency files, copies of which are also kept in the HCFA files. A memorandum from the head of the survey agency to the Assistant Director of Planning and Support Services for the State Bureau of Development Disabilities (BDD), dated October 6, 1977, states that Lakeland (and Firecrest School, not in issue here) could be certified as an ICF/MR:

> [W]ith the exception of completion of waiver request material and a written commitment from your agency that funds are available to correct the physical plant and staff requirements ... I am concerned about a written commitment that funds are available for correction ... Per information we have received from our federal counter-parts, such a commitment is required prior to certification of state operated institutions ...

Clearly the head of the survey agency could not possibly have certified Lakeland on September 16, when in October he writes that problems remain before certification. The funding problems were satisfied and on November 17, 1977 he signed the last item required for certification, a waiver for identification requirements for the blind. The memorandum from the head of the survey agency to BDD ends: "The waiver is approved."

Under the Board's reasoning above, following the principle of New Jersey, supra, certification can be effective November 17 even though the C & T form was not signed until the next day. The reason is that not only were all the requirements for certification met by that date but there

was a communication of that determination by the State survey agency. In fact, there are two forms of such communications.

The first is the approval of the waiver referred to, which is in the form of a memorandum from the head of the survey agency to the Coordinator of the BDD Planning and Support Services, representing the facility, telling him that the waiver requested in May 17, 1977 was now approved. In addition, in the documentary material submitted by the Agency, there is a memorandum dated the same day from the Deputy Director of the BDD to the head of the survey agency which says:

> Per our discussion today, you indicated that all areas of concern regarding the availability of funds for ... Lakeland had been answered.

Thus on November 17 the two remaining requirements for certification, namely, funding and waiver of identification for the blind, were not only met but the survey agency told the facility about it. Therefore, the Board will accept that date as the date of certification, even though the C & T was in fact not signed until the following day.

This is in line with Agency policy at this time. This appears in the affadivit by the Regional Medicaid Director submitted with the Agency Response to the Order to Show Cause. In recalling a meeting with State staff on July 14, 1978, he said:

> Another point raised in the meeting was that for private ICF/MR facilities the state designated the certification date as being prior to the certification and transmittal execution. We expressed our position that all providers - state as well as private - should be treated equally. In the private ICF/MRs we noted a few instances where certification date preceded the certification and transmittal execution by two or three days. I stated that we would take no actions to (sic) disallowance in these cases since the time lag was so short and obviously due to clerical processing delays ...

The one day time period may not amount to much in the actual dollar figure involved, but it seems only fair that on the Agency's own admitted policy it should not penalize the State for such a short delay. The disallowance is therefore reversed for the one day of November 17 for Lakeland School.

2. Later Regulations

Grantee also claims that the "proposed rules" are "contrary and in conflict with the position taken by the Medicaid Bureau." (Application for Review, p. 5). The rules to which Grantee refers were proposed on

February 5, 1979 (44 FR 6958) and were issued in final form on April 4, 1980 (45 FR 22933). Under the new rule, 42 CFR 442.13, the effective date a state Medicaid agency enters into a provider agreement may now be earlier than the date of certification. If all Federal requirements are met on the date of the onsite survey, the agreement must be effective on the date the onsite survey is completed, for a new certification. 442.13(b). If all Federal requirements are not met on the date of the survey, the agreement must be effective on the date the provider meets all requirements, or the date the provider submits a plan of correction acceptable to the State survey agency or an approvable waiver request, whichever date comes earlier. 442.13(c). The Agency admits that if these provisions had been in effect at the time of the disallowances here, FFP would be payable for part of the disallowance period, at least for Rainier School. However, there is nothing in the new regulation to indicate that it was intended to be retroactive. The regulatory provisions in effect at the time of the periods covered by the disallowances here were amended by the new regulations. The Summary and Comment on the Proposed and Final Rules (45 FR 22933), make it clear that the regulation is changing the requirements for the effective dates of provider agreements to make the Medicare and Medicaid requirements conform.

The Board in Maryland, supra, rejected the same argument made here by the Grantee:

> Nevertheless, we find that the Agency's interpretation of the regulations in effect during the period of the disallowance represents a valid exercise of its administrative responsibilities. The fact that the Agency has now decided to change its policy does not invalidate its prior actions (p. 4).

3. Estoppel

The second major argument of the State is based on an estoppel theory. This was loosely articulated in the Applications for Review, where it was stated that the State certification agency operated "with the expressed understanding" that it could certify a facility with an effective date prior to the execution of the C & T forms (p. 2). There was also a statement that the State "justifiably relied on past business practices with the Medicaid Bureau." Id, p. 1. The only specific statement relied on was by the Regional Medicaid Director, "that payment should not be dependent on technicalities of paper flow to DHEW." Id, p. 4. After the Board in its Order to Show Cause pointed out the lack of any documentary support for the State's claim, the State in its Response stated that if there were an evidentiary hearing, it would show that HEW personnel had "led the State in assuming" that the date of certification could be dated back before the execution of the C & T form (p. 3).

In the telephone conference of March 23, 1981 the Board asked if the State had facts to support its claim, and whether a hearing was necessary. In the telephone conference of March 25, the parties agreed to submit affidavits and counter-affidavits in lieu of a hearing, which was specifically waived. (See also Confirmation of Conversation of April 8, 1981, dated April 14, 1981).

In a very recent decision the Board said it was not necessary to reach the underlying legal issues of estoppel if the grantee has not satisfied its burden of proof of every element necessary to establish an estoppel. Montana Department of Social and Rehabilitation Services, Decision No. 171, April 30, 1981, p. 5.

> We do not here reach the issue of whether equitable estoppel can be asserted against the Agency in the administration of the Medicaid program. Even if equitable estoppel could be asserted against the Agency, the State has the burden to satisfy each of the following criteria for the application of the doctrine:
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> > Four elements must be present to establish the defense of estoppel: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.
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> Hampton v. Paramount Pictures, Corp., 279 F.2d 100, 104 (9th Cir. 1960), United States v. Georgia Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970), and see, Choat v. Rome Industries, Inc., 462 F. Supp. 728, 730 (N.D. Ga. 1978).

Much of the material submitted by the State here clearly can not meet the requirements for proof of an estoppel. Two of the affidavits are simply hearsay on hearsay. In each the affiant states that he was told by a State employee that an HEW employee had told him that a facility could be certified prior to the date the C & T form for that facility was signed.

The affidavit by the present Assistant Director of the State BDD also states that in June 1978 a letter from Region X indicated for the first time that the Agency was interpreting the date of certification to mean the date on which the C & T form was signed. This same affidavit also refers to a meeting on July 14, 1978 between State and HEW staff, at which the State maintains HEW staff said they "believed" that certification could be effective back to the date of the survey, and the Regional

Medicaid Director stated that funds would not be disallowed because of delays in paper processing.

Even if these statements were more definite, they would not support the position of the State because they were made after the C & T forms were signed. As pointed out in Montana, supra, one of the elements required to prove estoppel is a reliance to one's injury. There can not be any detrimental reliance on statements or conduct which came after the questioned action was taken.

This leaves the affidavit of the Head of the State Nursing Home Survey Section who actually signed the C & T forms. He states that sometime in the late spring of 1977 (before he signed the C & T forms) he was told that ICF/MR facilities could be certified back to the date of completion of the initial survey of the schools if they were then in sufficient compliance for certification. If they were not in compliance then, they could be certified back to the date they were in compliance. He goes on to state that in his judgment the surveys showed the two schools to be in sufficient compliance to be certified with an effective date of July 18, 1977. The reply affidavit from the Agency employee in question shows that he was at the time a "program representative" for the Health Standards and Quality Bureau of HCFA, and "monitored state survey documents for Medicaid certification of health facilities in Washington State."

To summarize the affidavits, the State employee is positive that he was told that certification could be dated back to the date a facility was in compliance based on a survey and a plan of correction. The Agency employee does not recall any such specific statement, but says that in any case it was not his function to interpret Medicaid policy on effective dates for Medicaid provider agreements for claiming FFP. It is significant that he does not in so many words deny saying that a C & T form could be dated back, apart from its effect on the date of a provider agreement and FFP, if the facility were in fact in compliance on the earlier date.

Even if the State's affidavits did make out an estoppel, and the law would permit it to be applied against the Federal government, the Board is of the opinion that in no event should the backdating of the provider agreement be permitted to a date before the proper written acceptance of a plan of correction and a communication of that acceptance to the facility or the single state agency.

The Board is not impressed with the conclusory statement by the head of the survey agency that the facilities had been in substantial compliance prior to his acceptance of a plan of correction for the facilities, in fact back to July 18, 1977. In its Response to the Order to Show Cause, the State points out that an initial plan of correction for Rainier School was submitted to the survey agency on November 16, 1977 (p. 1). This plan was not accepted and the form was transmitted back to the

provider representative, who resubmitted it "with handwritten changes" on March 10, 1978. The State argues that the plan as corrected did not make any substantive changes from the previous November 1977 submission. Leaving aside the obvious question of why it was sent back in November if it was all right, an examination of the form itself (State's Response to Order to Show Cause, Exhibit 3), shows very substantial handwritten changes. For example, the plan of correction statement that an Infection Control Committee "was formed July 14, 1977" is changed to a statement that it "will be formed," with a completion date of July 1978.

Similarly, there is no reason why this Board should give serious consideration to the statement on p. 2 in the State's Response to the Order to Show Cause that an acceptable plan of correction was established for Lakeland School on May 17, 1977, even though the actual written and typed plan was not submitted until August 23, 1977.

If the Agency representatives did in fact mislead the State into relying on the belief that the date of execution of the C & T form itself was not critical, we still would not go beyond the date of acceptance of a plan of correction and an appropriate communication thereof. No matter what anyone told the State's representatives, there is no basis for the Federal government starting to pay its matching share for patients in a facility when the State official in charge of doing so has not in writing actually accepted the plan of correction for it and started to tell someone he has done so.

The Board has already said above that it will accept as the date of certification of a facility a date prior to the date the C & T form is actually signed under certain conditions. These are: that an actual written plan of correction of any deficiencies be accepted in writing by the state survey agency, that all requirements for certification have been met, and the state survey agency takes steps to notify the facility or the single state agency in writing of its actual determination of certification. Since the Board would go no further in these cases even if it did accept the State's claim of estoppel as meeting both the legal requirements and the elements of proof required, the result would be the same.

Specifically, the plan of correction for Rainier School was not accepted until April 26, 1978. It was not communicated before the C & T form was signed on April 27, so that is the earliest date the provider agreement can be effective.

For Lakeland School, the plan of correction was accepted on September 16, 1977, but all requirements were not met until November 17, 1977, when the facility was so informed. Therefore the provider agreement is effective that day, even though the C & T form was not signed until the next day.

Conclusion

The disallowance is upheld as to Rainier School in full. The disallowance is upheld as to Lakeland School except for the one day, November 17, 1977.

/s/ Cecilia Sparks Ford

/s/ Norval D. (John) Settle

/s/ Alexander G. Teitz, Panel Chair